"I must go further and consider whether even if a *prima facie* case is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced."

It appears to me that the second sense is the proper meaning to accord to this expression, and is the meaning generally accepted by our courts. Gordon-Smith Ag. J.A. said in *Public Prosecutor* v. *Chin Yoke*,[5] adopting the definition given in *Mozley and Whiteley's* Law Dictionary (5th Ed.):

"A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

When a court has ruled that a *prima facie* case has been made out by the prosecution at the close of its case and calls upon defendant to make his defence, and defendant chooses to remain silent, then and only then is the case against him proved beyond reasonable doubt.

"The decision to uphold or reject the submission ('of no case to meet') should not depend upon whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but upon whether the evidence is such that a reasonable tribunal might convict."

states the 1962 *Practice Note* ([1962] 1 All E.R. 448) cited by the learned magistrate. Under section 137(f) of the Criminal Procedure Code, however, the trial court is clearly the tribunal to make such a decision, and must indeed regard itself to be a reasonable tribunal and not concern itself with how some other hypothetical reasonable tribunal might regard the evidence at that stage of proceedings. The words of the statutory provisions are clear.

The learned magistrate was correct in holding that before calling upon the defendant to make his defence, the court had only to be satisfied that the prosecution has made out a *prima facie* case.

However, I am left in doubt whether, in holding that prosecution had made out a *prima facie* case, he had because of his reliance on the passages from *Cross* on Evidence cited by him and the *Practice Note* of 1962, indeed determined, in the words of *Soo Sing's* case "whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt".

The appeal is therefore allowed, the order of conviction set aside, and the case remitted to the court below for re-trial by another magistrate.

Appeal allowed.

Solicitors: *Lawrence & Joseph.*

MULLER & PHIPPS (M) SDN. BHD. v. PENANG PORT COMMISSION

[O.C.J. (Chang Min Tat J.) May 4, 1974]
[Penang — Civil Suit No. 287 of 1972]

Port Authority — Bailment — Breach of duty of bailors — Penang Port Commission By-laws 1957 — By-law No. 64.

Evidence — Invoice — Admissibility of.

The plaintiffs imported 3 packages of certain articles which were unloaded at the defendants' wharf. The cases were in apparent good order and condition. The goods were not opened or examined as the cases outwardly looked intact and untampered with. A copy of the bill of lading which did not indicate the nature or contents of the three cases was delivered to the defendants. The goods were stored in the defendant's godowns and after a period of 7 days the plaintiffs took delivery of the 3 packages. The agent of the plaintiffs thereupon noticed that one of the packages was too light. He then requested an outward survey which was done in the presence of this agent, representatives of the defendants and certain other officials. There were shortages discovered in the contents of 2 of the 3 packages. The plaintiffs could only ascertain their detailed loss when they received their invoice. The claim was for this loss, alleging failure on the part of the defendants to make full delivery implying that the goods were lost while in the custody of the defendants. The plaintiffs sought to prove their claim by means of the invoice as conclusive proof of the shipment.

Held: (1) following *Sin Tiew Bee* v. *Public Prosecutor*[1] the invoice was inadmissible in the way in which it was sought to put it in;

(2) even if it was admissible it was insufficient as the evidence of the packer, checker and exporter were also required.

Case referred to:-

(1) *Sin Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200 F.C.

CIVIL SUIT.

Mohideen Abdul Kader for the plaintiffs.

Lim Peng Siew for the defendants.

Chang Min Tat J.: In this action, the plaintiffs sued the defendants in respect of a consignment of lighters and flints which they alleged were delivered into the custody of the defendants and which in breach of their duty as bailees the defendants had so far failed to re-deliver to them.

The goods were said to be packed in three cases and shipped from London on board s.s. Cardiganshire. The three cases were unloaded at Penang Wharf on 20 November 1971. The unloading was supervised by a tally-clerk, as was the practice at that time, employed by a firm of stevedores acting on behalf of the shippers. This tally-clerk prepared a list of all the goods unloaded. Carbon copies were taken. One of these copies was given to an official of the defendants. This official's signature on another copy would constitute a receipt for the goods. In normal circumstances, the list would declare that the goods were landed in apparent good order and condition. Where the goods were not visible as when they were packed in cases, this declaration would refer to the outward condition of the cases. Short of opening up the cases, there could be no ascertainment of the quantity and condition of the goods actually contained in them. It was apparently not the custom to open packages which outwardly looked intact and untampered with. There

would be a serious dislocation of the normal business of a port if such was the practice.

The packages were therefore accepted on their apparent condition. This was made clear by By-law No. 64 of the Penang Port Commission By-laws 1957.

"64. The tallys given by the Commission for cargo shall be deemed to be based upon the outward appearance only of the packages and shall bear the following endorsement 'Received in apparent good order and condition, or as otherwise stated, not accountable for weight, measurement, contents or value and subject to all the clauses governing the relative Bill of Lading'."

There was no acceptance with regard to their contents.

Where, however, the packages were seen to be in a condition as to give reasonable cause for suspicion, the shipping agents would for their own protection ask for a shipper's survey which would be conducted in the presence of all parties concerned. Only after such a survey would the goods as ascertained to have been received be delivered to the defendants for storage until taken delivery of by the consignees. The defendants would thereafter be responsible for these goods and there was evidence that in such an event, they would store the goods in a place of special protection.

For goods of value the defendants have devised a special procedure. It is laid down in By-law 68 that —

"68. In no case shall the Commission be responsible for the weight, size, character or condition of the contents of packages or for the weight of bulk cargo unless such weight is verified at the time it is received into the Commission's custody, and in no case be liable for a greater value in regard to any goods than is stated upon Ship's Receipts, Bills of Lading, Manifests or other documents as regards declaration of values and for this purpose the Commission may rely upon and the owners of the goods shall be bound by, all statements, exceptions and conditions endorsed upon such Ship's documents as aforesaid."

Quite naturally a special fee would be charged, as would be reasonable for the extra work involved. The defendants made a point that this special procedure was not adopted by the consignees.

To revert to the facts of the case, the three cases in apparent good order and condition in respect of the plaintiffs' importation were delivered into the custody of the defendants. The markings on these cases were as shown in the bill of lading a copy of which was delivered to the defendants. There was of course no indication whatsoever either on the bill of lading or on the cases to indicate their nature and contents.

Mr. Mohideen for the plaintiffs drew my attention to the weights of the packages declared on the bill of lading. It was however not his case that the liability of the defendants as bailees arose from any failure to check the weights of the packages received. No evidence was led and no cross-examination was directed, to establish the necessity for any procedure for weighing, or to any fact that the tally-clerk ever checked the weights.

The goods were stored in the defendants' godowns until 23 November 1971 when they were despatched by one of their lighters to their godowns in Butterworth. Seven days later, on 30 November 1971, the plaintiffs took delivery of the three packages. It was then that their agent PW3 Gian Kok Wah noticed that one of the packages was too light. His suspicion was aroused entirely by this one circumstance. He could not see any outward sign of the packages having been tampered with. He however asked as was within his right for an outward survey. This was done in the presence of this agent, and three representatives of the defendants: a security officer, their traffic supervisor and another official.

The survey report was made in these words:

"Survey List of Damaged Cargo

N.B. — The exact outward condition of the packages before survey must be stated below and the attention of all those attending the survey must be drawn to the condition of the package before it is opened for survey.

Ex. ss. Cardiganshire arrived 18/11/71.

Marks & Numbers		*Particulars & Cargo*
M.P. 000 70 IPOH via B'worth/Pg.		Outward Survey Without Prejudice Ctns in good order & condition, light in weight, O/E found contg:—
1.	1	ctn contg. 1 ctn OK & 1 ctn contg. 8 boxes and 12 Pkts. empty.
2.	1	ctn contg. 2 ctns empty.
3.	1	ctn contg. 22 Boxes OK.

Sgd. Illegible Sgd. Illegible
Sgd. „ Sgd. „ „

There was no admission of liability on the part of the defendants. It was agreed between both parties that the packages were "in apparent good order and condition." The survey revealed that all the contents of one package and some of the contents of the other two packages were missing. The exact loss could not be stated in the survey report. There was a good reason for this. At that time no one had any exact idea of the entire importation. All that was noted, in fact, all that could be noted was that a number of the containers in the packages were found to be empty. It was only when the plaintiffs checked what they took delivery of with their invoice that they could detail their exact loss. They now made a claim for this loss which they set out with particularity in their statement of claim.

Their claim must be seen to be based on an averment that all the goods declared in their invoice were delivered into the custody of the defendants and their loss was said to arise from the failure on the part of the defendants to make full delivery. They implied that the defendants could not do so because the goods lost were pilfered while in their custody.

The defendants at all times rejected the claim and continued to do so, on the contention that what they had received were three packages and that they had redelivered these salf-same packages in the same condition in which they were received. They had been shown no proof that the packages had been opened and the contents rifled while they were in their custody. They were the end-receivers and their complaint was that they were made to be responsible for what could be the omission or fault of others. It was their contention that until and unless it was conclusively proved that all the articles mentioned in the invoice and as set out in the statement of claim had been factually packed in the three cases, and had been shipped as so packed

and had been delivered into their custody, they could not be held to be responsible.

It was, even on cursory examination, not an unreasonable contention. Faced with it, Mr. Mohideen for the plaintiffs relied on the invoice as conclusive proof of the shipment.

Now, this invoice had never been introduced into evidence at any time before the plaintiffs' last witness. It was never previously mentioned in any affidavit of documents. As a matter of fact, the plaintiffs had at no time made such disclosure, even when pressed to do so by the solicitors for the defendants, though it must be said that the defendants would appear to be remiss in not compelling disclosure. Be that as it may, the invoice was a document that in the course of shipping did not need to be shown to the defendants as the party with the responsibility of operating a port. It might be needed for clearance by excise but for unloading purposes, the defendants needed no more than the bill of lading and a note of the markings on the cases. Then, of course, an invoice is a unilateral declaration, not made under oath, by a party who in this case was not a party to the action and not called as a witness.

Mr. Lim Peng Siew for the defendants made two points. First, he submitted that the invoice was inadmissible in the way in which it was sought to put it in. He relied on the authority of *Sin Tiew Bee* v. *Public Prosecutor*.[1] Secondly, he contended that the invoice even if admissible was not sufficient to establish the contents of the cases. What was needed at least was the evidence of the packer and the checker in addition to that of the exporter.

In my view and with respect, even after hearing Mr. Mohideen in reply, the submissions of Mr. Lim Peng Siew were sound. I ruled the invoice inadmissible.

At this stage, Mr. Mohideen applied for an adjournment to call the further evidence. However on the pleadings, it was evident from the commencement of the action that the onus lay on the plaintiffs to prove their loss and this they could do, where the contents of cases were said to be lost, only by proving what were sent in the cases and what were actually found therein. The difference would be their loss. They should therefore have come prepared with this evidence. It was not a matter that arose *ex improviso* or should have caught them by surprise For these reasons, I ruled against the application.

In the absence of this evidence, I was of opinion that the plaintiffs had not proved their loss on a balance of probabilities and accordingly I dismissed their claim with costs.

Claim dismissed.

Solicitors: *Lim Kean Chye & Co.; Lim Huck Aik & Co.*

LIAN YIT ENGINEERING WORKS SDN. BHD. v. LOH AH FON & ORS.

[O.C.J. (Abdul Hamid J.) May 13, 1974]
[Kuala Lumpur — Originating Motion No. 66 of 1973]

Administrative Law — Certiorari — Award of Industrial Court — Error on the face of the record — Excess of jurisdiction — Employment Ordinance, 1955, ss. 13 and 15 — Industrial Relations Act, 1967, ss. 41 and 42.

In this case the respondents, employees of the applicants, had absented themselves from work and gone on strike in protest against the dismissal of two of their colleagues. They were subsequently dismissed by the applicants. The matter was referred to the Industrial Court which held that the dismissal of the two workers by the management was inequitable and without just cause or excuse; that there was no lockout by the management and that there was a strike but it was a legal strike. The Industrial Court ordered the workers to be reinstated. On the motion for a *certiorari* it was argued that the record of the proceedings of the Industrial Court contained two errors on the face of the record, that is, (1) in finding that the dismissal of the workers by the applicant was improper or unjustified; (2) in not finding that the workers themselves terminated their services having broken their contract of service by going on strike and continuously absenting themselves from work for more than two days.

Held: (1) in the light of sections 13 and 15 of the Employment Ordinance it would seem clear that a worker who continuously absents himself from work for more than two days without reasonable excuse commits a wilful breach of the contract of service for which the employer may terminate his service without notice;

(2) in this case the Industrial Court failed to consider whether the workers did continuously absent themselves in circumstances falling within section 15(2) of the Employment Ordinance;

(3) as the matter in dispute in this case fell within sub-section (3) of section 12 of the Industrial Relations Act, 1967 the strike was illegal. The Industrial Court erred in law in finding that the strike was legal;

(4) since there were errors on the face of the record, the decision of the Industrial Court should be quashed.

Cases referred to:-

(1) *Selangor Omnibus Company Ltd.* v. *Transport Workers Union* [1967] 1 M.L.J. p. 280.

(2) *Rex* v. *Northumberland Compensation Appeal Tribunal Ex-parte Shaw* [1952] 1 A.E.R. p. 122 at p. 131.

(3) *Wong Mook* v. *Wong Yin and 3 Ors.* [1948] M.L.J. p. 41 at p. 42.

(4) *Gleneagles Hotel Ltd.* v. *Wong Joe Whee* [1956] M.L.J. p. 37.

ORIGINATING MOTION.

R. R. Chelliah and *S. Kulasegaran* for the applicant.

Dominic Puthucheary for the respondents.

Abdul Hamid J.: This is a motion for an order of certiorari to remove into this court for the purpose of being quashed Industrial Court Award No. 34 of 1973 made on September 3, 1973 on the grounds that the record of proceedings of the Industrial Court contains two errors of law on the face of it, namely (a) in finding that the dismissal of the workers by the applicant was improper or unjustified; and (b) in not finding that the workers themselves terminated their services having broken their contract of service by going on strike and continuously absenting themselves from work for more than two days.

The order is also sought on the ground that the Industrial Court acted in excess of its jurisdiction in ordering that the said 137 workers be reinstated and